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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968.

**No. 811**

JOSEPHINE MISKUNAS,
*Petitioner,*

*vs.*

UNION CARBIDE CORPORATION,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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### JURISDICTION OF THIS COURT.

Petitioner's jurisdictional statement (Pet. 2) represents that this case presents jurisdictional reasons within the ambit of Rule 19(b). Respondent denies that any legitimate jurisdictional reason exists which would justify granting the petition. Respondent's analysis in this regard is hereinafter set forth.

### QUESTION PRESENTED FOR REVIEW.

Ordinarily, a petitioner's statement of the Question Presented for Review can be said to fairly frame the issue involved. Such is not true in the instant case where Petitioner has loaded the question and framed it in such a way as to be misleading and prejudicial to the Respondent.

Specifically, the Question Presented for Review by

Petitioner assumes that her claim in this case is identical to that which her husband would have under Indiana law had she been injured and that the word "consortium" is a generic term with but one meaning under Indiana law for both husband and wife. Respondent denies that these are valid or legitimate assumptions.

Petitioner's claim in the United States District Court (in four paragraphs, each with a differing theory of liability) sought damages on the alleged basis that she had been "deprived of the society, services, companionship and consortium of her husband." (Pet. App. 1a) The United States District Court dismissed the claim on the basis that the substantive common law of the State of Indiana did not recognize any such cause of action. The United States Court of Appeals for the 7th Circuit affirmed that dismissal and assumed, without deciding, that the respective claims of a husband and wife for so-called loss of "consortium" arising from an injury to the other were identical.

It is therefore submitted that the only proper question which can be submitted is:

> Does the equal protection clause of the Fourteenth Amendment of the United States Constitution prohibit the United States Court of Appeals for the 7th Circuit from enforcing the substantive common law of Indiana which denies a wife the right to recover damages for loss of the society, services, companionship and consortium of her husband who is injured in an accident?

## CONSTITUTIONAL PROVISIONS INVOLVED.

Under this heading, Petitioner sets forth the language of the Fifth Amendment to the United States Constitution as well as that of the Fourteenth. Nothing else is said in the Petition in respect to the Fifth Amendment other than quoting it under this heading. It must, therefore, be concluded that Petitioner has abandoned any claim that the Fifth Amendment is in any way involved in this matter.

## THERE IS NO REASON TO ALLOW THE WRIT.

### Husband and Wife Rights Are Not Reciprocal Under Indiana Law.

This case is bottomed on facts which, under the doctrine of *Erie Railroad Company* v. *Tompkins* (1937), 304 U. S. 64, 82 L. Ed. 1188, required that the District Court and the Court of Appeals apply the substantive common law of the State of Indiana to determine whether or not Petitioner presented a claim upon which relief could be granted. That question was resolved adversely to Petitioner in both the District Court and Court of Appeals. It is, indeed, clear beyond any question or argument that the common law of the State of Indiana does not recognize any claim in a married woman for loss of her husband's "society, services, companionship and consortium" occasioned by a negligent injury to him.

*Brown* v. *Kistleman* (1912), 177 Ind. 692, 98 N. E. 637.

*Boden* v. *Del-Mar Garage* (1932), 205 Ind. 59, 185 N. E. 860.

*Burk* v. *Anderson* (1952), 232 Ind. 77, 109 N. E. 2d 407.

*McDaniel* v. *McDaniel* (1964), 245 Ind. 551, 201 N. E. 2d 215.

Petitioner represents to this Court that "Throughout the litigation the parties have agreed that the substantive law of the State of Indiana protects a husband's counterpart rights in respect to recovery of damages for loss of his wife's consortium." (Pet. 6) This is inaccurate and misleading because at all times, it has been Respondent's contention that the common law of the State of Indiana does not give to the husband a claim which is identical to that which is denied to his wife. The Court of Appeals did

not, as Petitioner suggests, resolve this question in Petitioner's favor. That Court simply assumed without any analysis or argument that the claims of a husband and a wife were co-extensive, probably because it considered the constitutional argument presented by Petitioner without substance. Of course, the identity of the claims must be Petitioner's foundation premise because, as Petitioner says, "If the law of the State of Indiana did not protect the consortium rights of the husband, this Petitioner's claims would not be of constitutional dimension." (Pet. 8)

That the rights of a husband and wife are not fully reciprocal under Indiana law is not open to legitimate debate. Thus, a husband has the obligation to support his wife, but she has no such obligation to support him. As the Indiana Supreme Court said in *Supreme Council, etc.* v. *Grove* (1911), 176 Ind. 357, 369, 96 N. E. 159, 164, wherein a fraternal benefit association claimed the wife of a disabled member had an obligation to care for and support him:

> "We have no statute requiring a married woman to support her husband, and the common law does not require to do so. It does require him to support her."

A husband, likewise, is liable for medical expenses of his wife, but she is not responsible for his. So, when a wife is tortiously injured, the husband is damaged to the extent of these medical expenses, but when he himself is so injured, the wife is not similarly damaged. On this basis alone, therefore, a husband has a cause of action against the tort feasor while his wife would not have a corresponding action.

Historically the same principle applied to a wife's business earnings, but that has been made obsolete by statute. *Burns Ind. Stat. Anno.* § 38-103. This statute, however, does not affect the wife's obligation to serve her family and

husband. So, when the wife is tortiously injured and is unable to perform those services, the husband is damaged and is given a cause of action for loss of those services. Conversely, however, the wife has no cause of action for loss of her husband's family services and support. That is considered damage to the husband. Thus, under Indiana law, a husband has the sole right to recover for his impaired earning capacity and loss of earnings, both past and prospective. As it is said in *Brown* v. *Kistleman* (1912), 177 Ind. 692, 98 N. E. 637:

> "A wife has no cause of action against a third person for damages for negligent injuries to her husband, resulting in the diminution of his earning capacity and his consequent ability comfortably to support and maintain her, because the husband is entitled, in a proper action, to full compensation for such loss." (177 Ind. 693.)

Moreover, under Indiana common law, a husband has no cause of action as such for loss of companionship and society of his wife. Such claim must involve the element of loss of her services. As was said in *Boden* v. *Del-Mar Garage* (1932), 205 Ind. 59, 185 N. E. 860, the Court stated:

> "Upon an exhaustive examination of cases in many jurisdictions we find that wherever the husband has brought an action for damages on account of injuries to his wife by the negligence of a third party to recover for loss of service, companionship and society of his wife, the gist of the action, and the real basis of recovery, is for the loss of service, and not the loss of consortium. We have been unable to find any case in this state which holds that the husband may maintain an action growing out of an injury for the loss of consortium alone and unconnected with the loss of service; neither have we found any case where the wife may maintain such an action where it grew out of an injury caused by negligence to the husband." (205 Ind. 69.)

In other words, under the Indiana common law, the essential and critical element of a husband's action for "loss of consortium" is loss of his wife's services. On the other hand, a wife, under Indiana common law, cannot recover for loss of her husband's service by reason of injuries to his person because the Indiana courts have given that right of recovery to the husband. Consequently, the claim which the Plaintiff here seeks to maintain involves only the intangible, etherial, and purely personal relationships of her marriage and is different from that which Indiana law gives to her husband. Whatever other states may say about the meaning of "loss of consortium", the Indiana courts have defined the essential elements of recovery such that the claim of Plaintiff here for loss of "society, services, companionship and consortium" is not the same as the claim of her husband, bottomed as it is on the loss of services and expense.

Finally, it is crystal clear that under Indiana law, in the absence of statute, husband and wife are an entity in all situations so that the husband, under that law, would recover for any injury to the marriage relationship itself. Herein lies the real fallacy of the Petitioner's argument and the dissent of Judge Schnackenberg in the Court of Appeals—both assume that the different approach to husband and wife injuries under Indiana law is premised upon the disability of the wife rather than upon the entity theory of husband and wife. That Indiana follows the entity theory is made clear by the recent case of *Hannah* v. *Hannah* (1968), 15 Ind. Dec. 682, 241 N. E. 2d 376, wherein a husband sued his wife for injuries occasioned by her negligent operation of an automobile. The trial court sustained the husband's motion for summary judgment upon the theory that the doctrine of interspousal immunity for negligent tort was a part of the Indiana common law. In affirming it was held:

"This court believes that the trial court was correct in sustaining appellee's motion for summary judgment. Our affirmance of this result is founded upon the sound reasoning of our courts first enunciated and subsequently adopted in this jurisdiction without interruption since 1885 in that Indiana adheres to the common law theory and, thus, does not allow an individual to sue his spouse in an action resulting from a negligent tort. Our Supreme Court in *Barnett* v. *Harshbarger* (1886), 105 Ind. 410 [5 N. E. 718], provided the initial interpretation:

> 'The rule of the common law proceeds upon the theory that in legal contemplation the husband and wife are one person, *and not upon the theory that the wife is under a legal disability.* This is unquestionably the common law, and that is a part of the law of the State, so that it still prevails unless abrogated either by the express words of the statute or by necessary implication.' (Emphasis supplied.)

"Our General Assembly modified the common law legal relationship between husband and wife with the enactment of the Married Woman's Acts, Burns' Ind. Stat., § 38-101—38-126, which now provide certain independent rights and disabilities as between spouses. The General Assembly, however, did not enact a statutory provision specifically stating that one spouse may sue another spouse for a negligent tort. The absence of any explicit statutory authority coupled with our long standing adherence to the common law precludes recovery in the case at bar. Indiana has, in fact, provided definite statutory exceptions which have abrogated various common law principles of the husband-wife relationship, but in the absence of such statutory authority, this court is required to consider the husband and wife an entity in all remaining situations.

"Our court has previously stated this rule in the case of *Hary* v. *Arney* (1957), 128 Ind. App. 174, 145 N. E. 2d 575, wherein the court stated:

> 'It is well settled in this State that the Married Woman's Acts have not abrogated the common law

> rule that marriage extinguishes all rights of action in favor of his wife against her husband. *Henneger* v. *Lomas* (1896), 145 Ind. 587, 44 N. E. 462; *Blickenstaff* v. *Blickenstaff* (1929), 89 Ind. App. 529, 167 N. E. 476; *Hunter* v. *Livingston* (1955), 125 Ind. App. 422, 123 N. E. 2d 912 (transfer denied).'
>
> "The General Assembly in its wisdom has enacted certain statutes bearing on the husband-wife relationship, and, had our General Assembly desired to provide a remedy to a spouse when injured by the tortious act of a negligent spouse, it would have expressly done so. Further, this court believes that there is no provision within the statute so indefinite as to permit a contrary result based upon necessary implication or statutory interpretation."

In other words, if there is any interference in the marriage relationship occasioned by negligent injuries to the husband, he has the right to recover the damages for such interference and not his wife.

**There Is No Important Question of Federal Law.**

Petitioner's claim that an important question of federal law is here involved derives from the erroneous and unsupportable premise that Petitioner's claim is identical to that which her husband would have under Indiana law had she been injured. It is solely from this fallacious premise that Petitioner argues that to deny her claim would deny her equal protection of the laws under the Fourteenth Amendment of the United States Constutution. Inasmuch as it has just been demonstrated that the claims of Petitioner and her husband had she been injured are not identical, there is no legitimate constitutional issue at all.

Even if it is assumed—as did the Court of Appeals—that the claims of Petitioner and her husband for so-called "loss of consortium" are identical, the denial of Peti-

tioner's claim here is not violative of the equal protection clause and "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland* (1961), 366 U. S. 420, 426, 6 L. Ed. 2d 393, 399. Moreover, when a classification is called into question under the equal protection clause, ". . . if any state of facts reasonably can be conceived that would sustain it, the existence of such state of facts must be assumed." *Morey* v. *Doud* (1957), 354 U. S. 457, 464, 1 L. Ed. 1485, 1490.

There are cogent and compelling reasons under Indiana law why the Indiana common law denies a wife any cause of action for so-called loss of "society, services, companionship and consortium of her husband."

Initially, as the opinion of the Court of Appeals correctly points out (Pet. App. 4(a), 5(a)), there is a very real likelihood that there would be a double recovery. As is pointed out in *Igneri* v. *Cite de Transports Oceaniques* (2nd Cir., 1963), 323 F. 2d 257, 264:

> ". . . it is doubted that the trial court's instructions and its own power, combined with that of the appellate court . . . to review verdicts for excessiveness would suffice to remove the danger of double recovery."

Furthermore, as observed by Chief Justice Schaefer in his dissenting opinion in *Dini* v. *Naiditch* (1960), 20 Ill. 2d 406, 435, 170 N. E. 2d 881, 895:

> "When two overlapping causes of action are made to grow where one has grown before, the possibility of double recovery is real. It cannot be obviated by the method suggested in the majority opinion [deducting from the computation of damages in the wife's consortium action any compensation given her husband in his action for the impairment of his ability to support], because there is no assurance that the wife's action will be tried first, or even that the two actions will be filed in the same court. A requirement of compulsory joinder of the two causes of action would help, but no such requirement exists."

Petitioner's suggestion (Pet. 7, 8) that there are many administrative devices to preclude a potential double recovery is just not true. There is no compulsory joinder in the State of Indiana and no way to prevent either the husband's case or the wife's case from being tried in Indiana courts and the other in the Federal system. There is, furthermore, no assurance that Petitioner's claim here will be tried prior to that of her husband so as to provide an opportunity for deducting the damages from any recovery by her husband and no way to determine precisely what those damages may have been if recovered with other damages in the wife's case. In other words, there is no machinery whatsoever presently existing under Indiana law to prevent the double recovery. Prevention of double recovery is a legitimate, sensible reason of itself to justify denying Petitioner's claim.

Secondly, and perhaps most importantly, it is most rational and sensible that the Indiana common law has chosen to classify a wife in a position similar to that of her children so far as the claim in question is concerned. That is to say, when a father is injured, his children suffer the identical loss of society, affection, companionship, etc. that is suffered by the wife. The only possible difference in the loss is the possible interference with the sexual relationship, which interference is compensable in the husband's action in any event. No state, in the absence of statute, has ever given a child a cause of action for damages occasioned by this type of loss or interference—and it cannot be seriously contended that there is any constitutional infirmity in that result.

Marriage and family are institutions of the state, and it is therefore most reasonable that a state, through its common law, should classify a mother and child similarly rather than stretch the equation of man and woman and perhaps open the door to other peripheral claims. This is

perhaps why this court denied a petition for writ of certiorari in *Krohn* v. *Richardson-Merrell, Inc.* (1966), 219 Tenn. 37, 406 S. W. 2d 166, cert. den. (1967) 386 U. S. 978, 18 L. Ed. 129, where the Supreme Court of Tennessee held:

> "Assuming, but not deciding, that the Fourteenth Amendment to the United States Constitution would ever rightly come into play in a case such as that presented by this record, it is our view that many and obvious differences between what, by legal logic, is recoverable by the male spouse for injury, on the one hand, and the female spouse on the other, may be conceived of. In short, under this view, the Tennessee rule with respect to recovery for loss of consortium does not work a 'discrimination' but no more than a practical and logical classification." (406 S. W. 2d 168, 169.)

See also *Seagraves* v. *Legg* (1962), 147 W. Va. 331, 127 S. E. 2d 605, where the Supreme Court of West Virginia denied that there was any substance to the equal protection argument here advanced by plaintiff.

Again, as the District Court said in *Lunow* v. *Fairchance Lumber Co.*, No. 66-122 Civil (W. D. Okla., 1967) affirmed on other grounds, 389 F. 2d 212 (10th Cir., 1968):

> "Nor can it be said in the light of the overall marriage relationship, the basic differences between the spouses and the different rights and responsibilities as between the spouses that invidious discrimination and an unreasonable classification is inherent in allowing the husband to recover for loss of consortium and recognize no such cause of action in the wife." (Memorandum Opinion, p. 9.)

Thirdly, to deny the Petitioner in this case a cause of action for her so-called loss of consortium permits Indiana, in the words of Judge Friendly in *Igneri* v. *Cie de Transports Oceaniques* (2nd Cir., 1963), 323 F. 2d 257, 267:

> ". . . to avoid conspicuous differences in treatment between similarly situated persons."

That is, under Indiana law, a wife is denied recovery against her husband's employer for so-called loss of consortium when her husband is injured in an accident which is compensable under the Indiana Workman's Compensation Act. *Burns Ind. An. Stat.*, § 40-1206; *Stainbrook* v. *Johnson County Farm Bureau Co-Op. Assn.* (1954), 125 Ind. App. 487, 122 N. E. 2d 884. Consequently, rather than producing a discrimination, the Indiana common law which denies the existence of a cause of action such as is asserted here by Petitioner produces a harmony and a most logical classification of all wives which avoids the caprice of whether the injury is work connected or not.

Finally, under a long line of authorities emanating from this court, sex alone represents a rational basis for distinction and the equal protection clause does not ordinarily prevent a state from making a classification dependent upon one's sex. As Justice Frankfurter stated in *Goesaert* v. *Cleary* (1948), 335 U. S. 464, 93 L. Ed. 163, upholding a Michigan statute prohibiting women (with certain exceptions) from bartending:

> "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." (335 U. S. 464, 466.)

**There Is No Conflict With Decisions of This Court.**

Petitioner suggests as a further purported basis of jurisdiction in this case that the judgment of the Court of Appeals herein in some way conflicts with the decisions of this Court in *Glona* v. *American Guaranty & Liability Insurance Company* (1968), 391 U. S. 73, 20 L. Ed. 2d 441 and *Levy*

v. *Louisiana* (1968), 391 U. S. 68, 20 L. Ed. 436. Just how this conflict exists is nowhere explained by Petitioner. This omission undoubtedly results from the fact that there clearly is no conflict.

The *Levy* and *Glona* cases involved the interpretation and constitutionality of a Louisiana wrongful death statute. The statute, as interpreted by the Louisiana courts, gave both legitimate and acknowledged illegitimate children a cause of action for wrongful death of either parent, but denied such a cause of action to illegitimate children. The statute also gave a mother a cause of action for wrongful death of both her legitimate and acknowledged illegitimate children, but denied her a cause of action for the wrongful death of her illegitimate but unacknowledged children. *Levy* involved the former aspect of the statute and *Glona* involved the latter. The avowed historical purpose of this distinction between legitimate and illegitimate children, and the only reason discussed for such distinction, was inhibiting the cause of illegitimacy. A majority of this court held that it could not find any rational basis for assuming a causal connection between "sin" and the distinction made by the statute as interpreted. It was concluded, therefore, that the statute was unconstitutional as a denial of equal protection of the law insofar as it distinguished between legitimate and illegitimate children.

Even if one disagrees with the majority opinion in these cases, one can hardly quarrel with the proposition that Louisiana's interest in preventing illegitimacy is, at best, only tenuously served by giving a cause of action to a legitimate child, but denying it to his illegitimate brother or sister. However, as has been previously pointed out, there are a number of sound and meaningful reasons why Indiana does not recognize the cause of action here asserted by Petitioner. Indeed, if the Indiana common law produced any other result, the rationale of *Levy* and *Glona* would

encourage and foster peripheral and perhaps fraudulent claims and would, under the guide of equal protection, effectively destroy Indiana's ability to continue its abolition of the common law marriage and the adulterous relationship. In other words, if, in the cause of "equal protection", this court holds that Indiana must give a cause of action to a legitimately married woman merely for loss of society, companionship and the sexual relationship of her husband, there is no justifiable reason why a cause of action for that same interference should not be given to a mistress or to any unmarried female who can establish an appropriate living relationship with a man. Such a result is totally offensive and certainly not a result which the equal protection clause of the Fourteenth Amendment contemplates or requires.

The decisions of this court in *Levy* and *Glona* in no way conflict with the decision of the United States Court of Appeals for the 7th Circuit. They simply point out that there must be a reasonable basis for the classification and there are many such reasonable bases for the classification accomplished in this case.

**There Is No Conflict Among the Circuits.**

Petitioner claims that the judgment of the Court of Appeals in some unspecified way conflicts with the decisions of the Second Circuit in *Igneri* v. *Cie de Transports Oceaniques, supra,* and the District of Columbia Circuit in *Hitaffer* v. *Argonne Co.* (D. C. Cir., 1950), 183 F. 2d 811, cert. den., 340 U. S. 852, 95 L. Ed. 624.

There is no conflict between these decisions and the decision of the Court of Appeals in this case.

The *Hitaffer* case held that under District of Columbia law, a wife has a cause of action for so-called loss of consortium resulting from a negligent injury to her husband.

This alone distiguishes it. It also held that such action was not barred by the Longshoreman and Harbour Worker's Compensation Act. (This portion of the holding was subsequently overruled in the case of *Smither & Co., Inc.* v. *Coles* (D.C. Cir., 1957), 242 F. 2d 220, cert. den. 354 U. S. 914, 1 L. Ed. 2d 1429.) The *Hitaffer* decision in no way involved the question of whether or not the equal protection clause of the Fourteenth Amendment would be violated by denying the wife a cause of action since it was held that the wife as a matter of substantive law had such an action.

The *Igneri* case held that the wife of a longshoreman could not recover for so-called loss of her husband's consortium occasioned by the negligence of the shipowner or the unseaworthiness of the ship. The court rendered its decision on the basis of its interpretation of the statute, and it had nothing to do with constitutional grounds.

Neither *Igneri* nor *Hitaffer* constitutes any conflict with the decision of the United States Court of Appeals for the 7th Circuit in this case. To suggest to the contrary is to either completely misread those opinions or to misrepresent the nature of these cases to this Court.

## CONCLUSION.

This was a case in which the Petitioner utilized the federal forum to circumvent the clearly established and sound common law in the State of Indiana. She initially tried to convince both the District Court and the Court of Appeals that Indiana law permitted her to recover. Failing that argument, she then asserted that the denial of her claim violated the equal protection clause of the Fourteenth Amendment and sought to have the Court of Appeals interfere in a question of state policy under the guise of "equal protection." Of course, had she chosen to do so, Petitioner

could have litigated her contentions in the State Courts of Indiana.

As it has been pointed out, there is no important question of federal law here involved for the reason that the rights of a husband and a wife are not fully reciprocal, either as between themselves or as to third parties. The Court of Appeals in this case did not decide a federal question in conflict with any applicable decision of this Court, and its opinion in this case is not in conflict with the decision of any other Court of Appeals on the same matter. These being the only basis for jurisdiction, and having not been met, we respectfully submit that the writ should not be granted.

Respectfully submitted,

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